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No. 303.

Brief of Collins for

IN THE

Filed Nov. 15, 1902.

Supreme Court of the United States

of America.

OCTOBER TERM, A. D. 1902.

SIMEON I. GRIN,
Appellant,

vs.

J. H. SHINE, United States Marshal, etc.,
Appellee.

Appellant's Brief.

GEORGE D. COLLINS,
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SIMEON I. GRIN, Appellant, vs. J. H. SHINE, United States Marshal, etc., Appellee.	No. 303

APPELLANT'S BRIEF.

I.

This is an appeal from a judgment of the Circuit Court of the United States for the Northern District of California, remanding the appellant to the custody of the appellee, upon *habeas corpus* sued out by the appellant to obtain his liberty; he being imprisoned by the appellee acting in the official capacity of United States Marshal for the Northern District of California, and in that behalf detaining the appellant under a *mittimus* issued by a Commissioner in proceedings in extradition, had at the instance of Russia and based upon a charge against appellant of *embezzling* 25,000 roubles. The proceedings are based upon a complaint addressed to the District Judge who issued upon it a warrant of ar-

rest returnable before the Commissioner who had not been previously authorized to hear the case, and who never received a complaint and with whom no complaint was ever filed and to whom no complaint was ever presented and who never issued a warrant of arrest. The case is replete with radical violations of the law of extradition.

II.

Errors Assigned.

1. The Circuit Court erred in deciding that the Commissioner possessed jurisdiction to hear the proceedings.

2. Also erred in deciding that the Commissioner possessed jurisdiction to adjudicate upon the matter of appellant's extradition to Russia.

3. Also erred in deciding that the Commissioner possessed the power and jurisdiction to issue the warrant of commitment in the matter of appellant's extradition to Russia.

4. Also erred in deciding that the warrant of arrest issued by the District Judge is valid and not void.

5. Also erred in deciding that the District Judge possessed the power and jurisdiction to make the warrant of arrest and the proceedings thereon returnable before the Commissioner.

6. Also erred in deciding that the complaint in the matter of the extradition proceedings, conferred jurisdiction on the Commissioner to hear and determine said proceedings.

7. Also erred in deciding that said extradition proceedings conferred jurisdiction on the District Judge to issue a warrant of arrest therein.

8. Also erred in deciding that the complaint in said extradition proceedings charges the defendant with the crime of embezzlement according to the laws of the State of California.

9. Also erred in deciding that there is evidence that the appellant committed the crime of embezzlement in the Empire of Russia.

10. Also erred in deciding that the papers in the matter of said extradition are authenticated as required by law.

11. Also erred in deciding that the certificate of the United States Minister to Russia, which appears attached to said papers, is in accordance with the requirements of the Act of Congress of 1882.

12. Also erred in deciding that the certificate last mentioned is valid and according to law.

13. Also erred in deciding that the appellant is not illegally imprisoned and restrained of his liberty in contravention of the Constitution of the United States, to wit: the fifth amendment thereof and in contravention of the extradition treaty between the United States and Russia.

14. Also erred in deciding that John H. Shine, United States Marshal for the Northern District of California does lawfully hold in his custody, the said appellant.

15. Also erred in deciding that said appellant is not entitled to be discharged from the custody of the appellee.

16. Also erred in denying to said appellant restoration to his liberty, upon said writ of habeas corpus.

17. Also erred in its decision dismissing the writ and remanding appellant in that he is deprived of his liberty without due process of law.

Brief of Argument.

It is quite impossible to understand why the principle fundamental in criminal law, that the accused shall have the benefit of the presumption of innocence, and that all proceedings against him shall be strictly construed against the prosecution, should not apply to extradition cases. "The principle," remarked Lord Abinger, C. B., "adopted by Lord Tenderden, that a "penal law ought to be construed strictly, is not only a "sound one, but the only one consistent with our "free institutions. The interpretation of statutes has "always in modern times been highly favorable to the "personal liberty of the subject, and I hope will always "remain so."

Murray vs. Reg., 7 Q. B. 707;
United States vs. Wiltberger, 5 Wheat. 95.

There is no persuasive force in the proposition that courts should seek to rid the country of persons whose extradition is sought; such persons are as fully entitled to the equal protection of the laws as are the citizens of the United States; their liberty is no less sacred than is the liberty of the citizen. While it is true that some judges

of *nisi prius* courts have manifested and expressed a purpose to deprive the accused of the law's protection, and have sought to diminish its value and importance by branding it with the much abused appellation, "technicality", yet it is not to be supposed that the odium of besmirching designation can serve to justify either a disregard of a very fundamental principle of the criminal law, nor excuse judical dereliction in failing to extend the accused the utmost protection guaranteed him by the law in defense of his rights. If some of those judges who are so ready to avoid the embarrassment of attempting to reply to that which is unanswerable, by resorting to deprecating terms in the nature of condemnation for all "technicality", would only pause for a moment and understand that technicality is the life of the law, and that juridical history is replete with illustrious instances of its exceedingly beneficent operation in maintaining the cause of justice, and in safeguarding the rights of the citizen against the exertion of arbitrary power, to say nothing of the great protection it has at all times afforded the innocent and the oppressed, there would be none of that senseless and unlawyer-like and unreasoning tendency to criticise the technicality of the law; the tendency is most reprehensible, because at best it is but a tribute to the populistic or, perhaps, anarchistic teachings of those who maintain that the law should not be a science nor anything more than the pliant and pliable instrument of " popular will";—a sort of mob sovereignty as it were. We therefore have no respect for an argument that hangs upon the ragged edge of invective against the technicality of the law.

The matter of extradition is of no such nature as to incline courts to view it with favor or indulgence. It not only has for its purpose the deprivation of liberty but it is a direct invasion of the political right of habitation within our territory, wherever and whenever the exile or banishment from our shores is wrongful; therefore every reason exists for construing the law strictly and exacting a rigid adherence to its requirements. It is entitled to serious consideration whether the appellant here shall be deprived of the protection given the rights of man by the laws of the United States and turned over to the inhumanity that has made revolting the penal system of Russia. Certainly nothing less than a clear case and a precise compliance with the law of extradition can justify the enforced exile of one who is under the protection of our laws. The notion that the individual is of such little consequence that he is to be sacrificed at the pleasure of the sovereign, is a survival of the times when monarchy was omnipotent and the subject had no rights that were worthy of consideration; the same notion has given rise to some indefensible propositions that have been referred to by judges who ought to know better, as being controlling doctrines in the modern law of international extradition; indeed one would think that the efforts of some judges at *nisi prius* to escape from the manifest requirements of the law by rejecting what they are pleased to condemn as being nothing but "technicalities", is due to their belief that every man holds his life and liberty at the arbitrary will of the sovereign and not under the protection of the law; with such judges the sovereign is the State and the mere

expression of his will is a sufficient warrant for the surrender of the subject even though he be within the protection and according to *Calvin's Case*, within the "ligeance" of our government. Every alien within our jurisdiction has the same right to the equal protection of our laws as is possessed by a citizen; embraced within that protection is the fundamental right to the presumption of innocence and the right to have the charge and the sufficiency of the evidence tested by the laws of the State in which he is apprehended; in this case, the law of the *forum* is the law of the State of California, in respect to whether the charge as laid constitutes the crime of embezzlement; whether the record shows a warrant of arrest upon the charge and whether there is any competent evidence supporting the charge. Whether the offense as charged is extraditable and whether the procedure in the matter of extradition has been complied with in respect to jurisdictional prerequisites must be determined from the treaty and from the laws of the United States.

1. In the first place, under the law governing the matter, the Commissioner had no jurisdiction over the case. The plain import of section 5270 of the Revised Statutes is, that the necessary authority must be conferred upon the Commissioner at a point of time previous to the issuance of the federal warrant of arrest. The warrant must emanate from the officer who hears the case; the warrant is, upon common law principles, quite elementary, jurisdictional in its nature; it is the very basis of the proceedings. And the statute explicitly makes it essential.

Sec. 5270, Rev. Stat.

The same statute confines the jurisdiction in respect to the hearing and determination of the case, to the officer or judge to whom the complaint is presented and who issues the warrant of arrest. The mere reading of the statute cited is amply sufficient to prove the correctness of our position; but we also cite:

Matter of Henrich, 5 Blatchf. 425;

Matter of Fares, 7 Blatchf. 45.

Our case was heard and determined by the Commissioner. No complaint was ever presented to him; nor was a warrant of arrest ever issued by him; nor was he ever invested with authority by any court of the United States, at any time prior to the filing of the complaint or the issuance of the warrant of arrest; in fact and as the record shows, no attempt was made to confer the essential authority upon him until *after* the filing of the complaint and until *after* the issuing of the warrant of arrest; and even then, the authority was not and never has been conferred by any *court* of the United States; but was merely attempted to be conferred by the District Judge acting not as a court but in chambers as the Judge of the court. Of course there is a wide and important difference between the two. The statute (sec. 5270) expressly requires that the necessary authority of the Commissioner be conferred by the *court*, as contra-distinguished from the judge of the court. In our case the complaint was not made under oath before any officer specified in section 5270; in addition to that fatal defect, the complaint was presented and addressed to the Judge of the District Court; *he* thereupon issued and signed the warrants of arrest and made the same returnable before a designated person as

Commissioner, although the necessary authority had not been previously or at all, ever conferred on the person designated in the warrant of arrest. The statute is the source and measure of the power of both the Judge and the person acting as Commissioner; it is very rudimentary then that no power or authority in respect to a special jurisdiction can be taken by intendment, construction or implication. The language of the statute is exclusively the test; if the terms used do not confer the powers asserted or claimed, then the necessary conclusion is that the jurisdiction has been denied.

In re Farez, 7 Blatchf. 45;
Long vs. Superior Court, 102 Cal. 452;
Winter vs. Fitzpatrick, 35 Cal. 269;
Chollar M. Co. vs. Wilson, 66 Cal. 376.

As the statute makes no provision for it, the *District Judge* had no power or jurisdiction to make the warrant of arrest returnable before the Commissioner and no authority to refer the case to him for hearing and determination. An appointment of the Commissioner the day *after* the filing of the complaint (which, it must be borne in mind, was addressed to and filed with the District Judge), was of course a nullity; the law requires (section 5270) that the necessary authority be conferred upon the Commissioner before the filing or presentation of the complaint; but if the appointment was valid, then the second warrant of arrest, which is the jurisdictional warrant here, is void, for if the District Court conferred the authority over the proceedings upon the Commissioner, then the power and jurisdiction of the latter thereby became exclusive of the District Judge, and he could not subsequently perform any

function in the case, for in respect thereto his power had been superseded.

1 Moore on Extr., sec. 301.

It is impossible that both the Commissioner and the District Judge should possess co-equal authority over the case; when the Commissioner is vested with the authority, it is as co-extensive as that conferred by the statute on the District Judge, and of equal dignity; it is quite impossible that both should exercise jurisdiction over the case; it must of necessity be exclusive in one or the other. Even concurrent jurisdiction can never be exercised concurrently by two or more distinct and independent tribunals or officers; the one first acquiring cognizance of the case, possesses exclusive jurisdiction over it. Applying that well-settled principle here, the exclusive jurisdiction vested in the District Judge and he could not divest himself of that jurisdiction by assigning or transferring the case to the Commissioner; on the other hand, if the jurisdiction vested in the Commissioner, then the District Judge had no power to subsequently issue the warrant of arrest.

The conclusion is that the Commissioner had no power to hear or determine the case:

1. He never issued the essential warrant of arrest;

2. The complaint was never filed with nor presented to him; on the contrary, it is addressed to and filed with and was presented to the District Judge. The contents of the complaint demonstrate that it is not made to the Commissioner;

3. Without both a warrant and complaint, the Commissioner is certainly without jurisdiction;

4. The Commissioner was never specially authorized to *receive* the complaint or issue the warrant *previous* to the filing of the complaint or *previous* to the issuance of the warrant. Therefore he had no jurisdiction to hear or pass upon the case.

"Where a warrant of arrest is returnable before a "Commissioner for hearing, it should be one who has "been previously appointed by the Circuit Court under "which he holds his commission to act under the stat-"utes relating to extradition."

1 Moore on Extr., sec. 301;

5. None of the officers designated in section 5270 of the Revised Statutes has jurisdiction of an extradition case and cannot acquire the necessary jurisdiction until a complaint has been presented to him and he, upon that complaint, issues his warrant of arrest returnable before himself. Such is the language of the statute;

6. As the District Judge acquired and exercised jurisdiction over the case, his jurisdiction was necessarily exclusive and being such he had no power to divest himself of that jurisdiction by transferring or assigning the case to the Commissioner. The jurisdiction over the case having become *exclusive* in the District Judge, no other officer designated in the statute could thereafter exercise any of the powers within the scope of that jurisdiction; otherwise the jurisdiction would not be exclusive. It is elementary that no court can divest itself of a jurisdiction once vested; the same rule necessarily applies to the Judge of the court.

The Circuit Court is in error in ruling that the Commissioner need not be specially appointed in extradition

cases and in invoking the general law as to the appointment of Commissioners of the *Court*. Section 5270 of the Revised Statutes has no application whatever to Commissioners appointed under the statutes referred to in the opinion filed by the Circuit Court.

The case of *Henrich*, 5 Blatchf. 414, relied upon by the lower court to sustain the jurisdiction of the Commissioner, has not the slightest application to the question, as the point for which it is cited was neither raised nor decided.

Cross vs. Burke, 146 U. S. 82;
Balch vs. Haas, 73 Fed. 974;
Central Irrigation Dist., 117 Cal. 388.

III.

The complaint charges no embezzlement.

The sufficiency of the complaint must be determined according to the law of the State of California.

In re Ezeta, 62 Fed. Rep. 972;
1 Moore on Extr., sec. 344.

Section 508 of the Penal Code of California is as follows:

"Every clerk, agent, or servant of any person who "fraudulently appropriates to his own use, or secretes "with a fraudulent intent to appropriate to his own, "any property of another which has come into his con- "trol or care by virtue of his employment as such "clerk, agent, or servant is guilty of embezzlement."

It is necessary, therefore, that the complaint show that the accused had the possession of the property, in this case the money, *by virtue of his employment*, and that he *fraudulently* appropriated it.

1. The averment is that the accused received the money "in his capacity of clerk". Clearly that is not an averment of receipt of the money *by virtue of his employment* as clerk. The allegation of the complaint may be true, and yet the money may not have been received by virtue of his employment. A similar allegation has been held to be fatally defective in not showing that the money was received by virtue of the employment even though it did show that the defendant received it *as clerk*. And the statute is identical with that in California.

State vs. Johnson, 21 Tex. 775.

The ruling is recognized as well settled law in

Moore vs. United States, 160 U. S. 272 and 274.

"For another reason, however, we think the indict-
" ment in this case is insufficient. If the words charg-
" ing the defendant with being an employee of the
" post-office be material, then it is clear, under the cases
" above cited, that it should be averred that the money
" embezzled came into his possession by virtue of such
" employment."

Moore vs. United States, 160 U. S. 274.

2. The complaint does not charge that the accused *fraudulently* appropriated the property. To constitute the offense, the law of California in the section of the Penal Code above quoted, requires that the money be *fraudulently* appropriated. It is true the complaint alleges that the accused "wrongfully, unlawfully and " feloniously appropriated said money"; but that is not the equivalent of an allegation that he did so *fraudu-*

lently, and does not supply the defect. The law is so stated in

Bishop on Statutory Crimes, sec. 458.

"Fraudulently in the statute is not covered by 'un-
" 'lawfully and feloniously' in averment."

1 Bishop's New Crim. Proc., sec. 613.

As to the necessity of pleading that the appropriation was fraudulent, see

People vs. Mitchell, 92 Cal. 590.

Every essential constituting the offense charged must be averred in the complaint, or it is fatally defective.

United States vs. Hess, 124 U. S. 486.

"The complaint before a magistrate must state the
" essential elements of the crime to a common cer-
" tainty."

People vs. Howard, 111 Cal. 656.

The rule there declared applies to extradition cases.

In re Farez, 7 Blatchf. 35.

There is nothing opposed to our position in the case of San Francisco vs. Randall, 54 Cal. 108, cited by the appellee. If the word "fraudulent" was omitted in that case, no point was made upon it and no decision rendered in that respect; and, therefore, under a well settled rule, the case is not authority on the question.

Cross vs. Burke, 146 U. S. 82;
Central Irrigation Dist., 117 Cal. 388;
Balch vs. Haas, 73 Fed. 974.

IV.

The oath to the complaint is taken before George E. Morse, and there is nothing to show that he was specially authorized, as required by section 5270 of the Revised Statutes. The absence of such authority, or which is the same thing, the omission to make it affirmatively appear, is fatal, and renders the oath a nullity.

1 Moore on Extr., secs. 284, 296;
Re Farez, 7 Blatchf. 34;
Re Kelly, 25 Fed. 268.

V.

Under the law of the State of California a person imprisoned on a criminal charge is entitled to his liberty on *habeas corpus* if the complaint does not state facts sufficient to constitute a crime or public offense.

Ex Parte Maier, 103 Cal. 479.

And the law of California is the law which governs the case.

In re Ezeta, 62 Fed. Rep. 972;
1 Moore on Extr., sec. 344.

VI.

The only reply made by the Circuit Court to the points raised upon the complaint is, that the word "embezzle" is used and necessarily imports all the elements of the crime. If anything can be considered elementary law it is the proposition that an accusation must state the facts as contra-distinguished from legal conclusions. Now to charge that a person "embezzled" certain prop-

erty is nothing but a naked conclusion of law, and is clearly insufficient.

Moore vs. United Ststes, 160 U. S. 270, 272, 274;
Com. vs. Moore, 5 Cush. 603;
People vs. Neil, 91 Cal. 468;
People vs. McKenna, 81 Cal. 158;
United States vs. Watkins, 3 Cranch C. C. 441;
United States vs. Hess, 124 U. S. 483, 487;
United States vs. Carll, 105 U. S. 611.

VII.

No Warrant of Arrest.

The treaty requires an authenticated copy of a warrant of arrest or some other equivalent judicial document issued in Russia by a judge or magistrate duly authorized to do so.

In the first place there is no such process in the record as a warrant of arrest nor its equivalent. In the next place, the papers in the record, other than the depositions, are not authenticated. There is nothing to show that the "examining magistrate" was duly or at all authorized to issue a warrant of arrest or to issue the "equivalent judicial document". The certificate attached to the papers is confined to the purpose of their use as *evidence* and says nothing about that part of the record not consisting of the depositions to which the certificate relates; nor does the certificate assert anything concerning the authority of the "Examining Magistrate" to make or issue the various orders appearing in the record, or to issue a warrant of arrest or the "equivalent judicial document". And even if a warrant of arrest or equivalent judicial document were in

the record, it would be void as it does not set forth the offense charged.

Matter of Farez, 7 Blatchf. 50;
1 Bishop New Crim. Proc., sec. 228.

That which is referred to by the Circuit Court as being warrants of arrest are manifestly not such. They are not and do not purport to be process; they may possibly be made the basis of a warrant of arrest or other equivalent judicial document to be thereafter issued; but that is all, even under the most liberal construction. A warrant of arrest or equivalent judicial document must be addressed to some executive officer and command him to seize the body of the accused and bring him before the magistrate.

1 Bishop New Crim. Proc., sec. 187.

There is no such warrant nor its equivalent in this case.

The Circuit Court is certainly in error in striking from the certificate, as being surplusage, the words "as "evidence". It does not meet our objection that there is no authentication of any warrant of arrest or of an "equivalent judicial document", nor anything showing authority in the magistrate, to issue such warrant or its equivalent, to say as does the Circuit Court that the words "similar purposes" used in the certificate have been construed to mean "evidence of criminality". The warrant of arrest or its equivalent can never be "evi- "dence of criminality". We repeat, the certificate is addressed exclusively to matters of evidence and therefore it cannot serve to authenticate anything that is not matter of evidence.

VIII.

No indictment.

According to the complaint the accused has been indicted; yet there is no indictment in the record. If there is an indictment, no other evidence of the charge or of the fact that the accused has been charged in Russia, is admissible.

Hawley on Extr., 47, 48;
1 Moore on Extr., sec. 226.

Of course it must be made to properly appear by the demanding Government, that the accused has been charged with or convicted of crime (Treaty, Art. I). In this case it is not claimed that the accused has been convicted of crime; the claim is that he has been charged with crime and has been indicted. Therefore, no evidence of the existence of the charge is competent or admissible unless it be an authenticated copy of the indictment. Without it the United States cannot determine whether the accused is charged with crime; nor whether the crime as charged is extraditable. The Circuit Court failed to grasp the point.

IX.

No valid certificate.

The certificate is fatally defective; it is not in accordance with the requirements of the Act of 1882. In the first place the certificate states that the papers "are pro- " perly and legally authenticated so as to enable them " to be received and admitted as evidence for similar " purposes by the tribunals of Russia".

The language of the Act of 1882 is, that the papers

" shall be received and admitted on such hearing for all " the purposes of such hearing if they shall be properly " and legally authenticated so as to entitle them to be " received for similar purposes by the tribunals of the " foreign country from which the accused party shall " have escaped, and the certificate of the principal dip- " lomatic or consular officer of the United States resi- " dent in such foreign country shall be proof that any " deposition, warrant or other paper or copies thereof, " so offered, are authenticated in the manner required " by this Act". This law provides for the admission and receiving in evidence of such papers on the hearing in the United States; whereas the certificate is, that the papers are so authenticated as to entitle them to be received and admitted *as evidence by the tribunals of Russia*. The phrase in the Act of 1882 "if they (the pa- " pers) shall be properly and legally authenticated so as " to entitle them to be received for similar purposes " by the tribunals of the foreign country from which " the accused party shall have escaped", does not relate to extradition purposes as asserted by the certificate, but has reference entirely to evidence of *criminality*.

So held in

Orteiza vs. Cortes, 136 U. S. 337, 338.

The certificate in our case says that the papers are entitled to be received and admitted in evidence in Russia for the purposes of *extradition proceedings*. There is quite a difference between the language of the Act of 1882, if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes, and the language of the certificate in

question, "are properly and legally authenticated so " as to entitle them to be received and admitted *as* " *evidence for similar purposes*". The Act of 1882 has reference to the ultimate fact; the certificate, on the other hand, instead of attestation to the fact, refers to what is admissible *as evidence of the fact*. We insist that the certificate is fatally defective.

In re McPhun, 30 Fed. Rep. 57;
In re McPhun, 24 Blatchf. 254;
Orteiza vs. Jacobus, 136 U. S. 330.

It is one thing to say that the papers are properly and legally authenticated "so as to entitle them to be received for similar purposes" by the tribunals of Russia; and quite another and essentially different thing to say, that they are properly and legally authenticated so as to entitle them to be received and admitted *as evidence* for similar purposes by the tribunals of Russia. A reference to the form of certificate prescribed by Judge Blatchford and which is set forth at page 45 of Hawley on International Extradition, will demonstrate the insufficiency of the certificate in our case. The certificate in the McPhun case, 30 Fed. 58, was much less objectionable than the one in our case and yet it was held to be fatally defective.

2. In the next place the certificate is altogether too indefinite; it does not identify the papers to which it relates; it certainly was not designed to embrace the orders of the "examining magistrate", nor the order permitting a civil suit; and yet they are just as much a part of the papers to which the certificate is attached as are the depositions. Our point is, that the certificate is too

vague in its reference; it is uncertain whether it has relation to only some or all of the papers; and if to some, it is uncertain which of them. The certificate should either specify the papers in detail or else should be separately attached to each.

" Each piece of the documentary evidence offered by " the agents of the foreign government in support of " the charge of criminality should be accompanied by " a certificate of the principal diplomatic or consular " officer of the United States, resident in the foreign " country from which the fugitive shall have escaped, " stating clearly that it is properly and legally authen- " ticated, so as to entitle it to be received in evidence in " support of the same criminal charge by the tribunals " of such foreign country."

In re Henrich, 5 Blatchf. 414;
In re McPhun, 30 Fed. 60.

Certainly the certificate in our case is not a compliance with this rule. The Henrich decision is approved in

Orteiza vs. Jacobus, 136 U. S. 337, 338.

X.

No evidence of authority to make complaint.

There is no evidence that the Russian Consul had authority to make the complaint. The requisite authority must affirmatively appear to have been specially conferred by the Russian Government.

In re Herris, 32 Fed. 583; reversed 33 Fed. 165;
In re Ferrelle, 28 Fed. 878;
1 Moore on Extr., secs. 219, 220;
Hawley's Intern. Extr., p. 35.

XI.

No evidence of embezzlement.

As to the question whether there is evidence of embezzlement, the law of California controls its determination.

See Treaty Art. 1, U. S. Stat. at Large, Vol. 28, p. 1072, and the evidence must be carefully scrutinized.

Hawley on Extr, p. 37.

1. The charge as set forth in the complaint is, that Zeefo entrusted 25,000 roubles of his money to the defendant who took the same and absconded therewith. Assuming the fact to be as charged, that *Zeefo* delivered the money to defendant and that it was Zeefo's money, the evidence is, that the money or rather the bank bills, were turned over to defendant who merely as a messenger, was to carry the same to the railroad administration to be by the latter sent to Novoroseesk; that instead of obeying instructions, he took the money and absconded; it appears that it was not within the scope of defendant's employment to receive money and transmit it. On the foregoing facts the defendant had nothing more than the bare custody as contra-distinguished from the possession of the money and he therefore could not and did not commit embezzlement. The offense, if any, was larceny.

United States vs. Clew, 4 Wash. C. C. 700;
Rex vs. Bass, 1 Leach C. C. 251;
Rex vs. Chipchase, 2 Leach C. C. 699;
Rex vs. Low, 10 Cox C. C. 168;
Phelps vs. People, 72 N. Y. 360 et seq.;
Com. vs. Berry, 99 Mass. 428;
Johnson vs. People, 113 Ill. 99;

2 East Pleas Crown, 566;
1 Wharton's Crim. Law, secs. 957, 960;
18 Am. & Eng. Ency. Law (2d ed.), pp. 473 et seq.;
10 Am. & Eng. Ency. Law (2nd ed.), 988.

It is claimed that this well settled rule has been changed or abolished by statute in California. But in that state as elsewhere, the distinction between bare custody and possession, in the law of larceny, and of embezzlement, is fully recognized as being inherent and elementary.

People vs. Raschke, 73 Cal. 381;
People vs. Belden, 37 Cal. 52;
People vs. Abbott, 53 Cal. 284.

And it is the law in California that evidence of larceny will not sustain a charge of embezzlement.

People vs. Johnson, 91 Cal. 265.
See Treaty, Art 2, U.S. Stat. at Large, vol. 28, pp. 1072, 1073.

There is nothing in section 508 of the Penal Code that is in conflict with the common law distinction between possession and the bare custody. If, under that section, property comes into the *care* of a servant *by virtue of his employment*, and he fraudulently appropriates it, his crime is embezzlement. But the "care" referred to in the statute, is possession as contra-distinguished from the bare custody.

People vs. Abbott, 53 Cal. 284;
People vs. Belden, 37 Cal. 52.

Formerly it was not embezzlement for a servant to appropriate the property of his master in the servant's *possession*, if that possession was derived from the *mas-*

ter. It was well settled that the statute relating to embezzlement was confined to cases where the servant received the property from a third person, but for the master. That distinction has been abolished by statute; and it is now immaterial whether the servant has received the possession from the master or from a third person; but the rule still continues, that if the servant has but a *bare custody*, and not the possession of the property, he commits larceny and not embezzlement if he appropriates the property. That, for instance, is the law in Illinois and Massachusetts and New York, where the statute relating to embezzlement was the same as in California, when the following were decided:

Com. vs. Berry, 99 Mass 428;
People vs. Johnson, 113 Ill. 99.
Phelps vs. People, 72 N. Y. 360.

It is also the law in Texas:

Cobletz vs. State, 36 Tex. 353.

Likewise in California:

People vs. Belden, 37 Cal. 52;
People vs. Raschke, 73 Cal. 381.

The note at p. 130 of 98 Am. Dec., relied upon by the counsel for the Russian Government, is misleading to one who is not familiar with the history of the law of embezzlement. An examination of the cases referred to in said note will show that they do not hold that a statute such as referred to in the note abolishes or in any wise affects the common law distinction between possession and bare custody. What the author of the note referred to is, that a statute making it embezzlement for a servant to appropriate property "under his care" covers the case where the property has been

received from the *master;*—a proposition that has no relevancy to the difference in law between possession and custody. The misleading part of the note lies in the use of the word "custody" in relation to the point that the statute renders it immaterial whether the servant received the property from the master or from a third person. In that connection, it is of course of no logical significance to inquire whether the servant has the mere custody of the property, as that matter has no bearing upon the point in reference to whether the property was received from the master or from some third person. There is no decision cited by the author of the note that sustains or tends to sustain the proposition that a servant having the "bare custody" as contra-distinguished from the possession of the property can be prosecuted for embezzlement. He cites cases from New York, Illinois and Texas, in all of which States the common law distinction between the bare custody and the possession is recognized and followed.

Phelps vs. People, 72 N. Y. 360;
People vs. Johnson, 113 Ill. 99;
Cobletz vs. State, 36 Tex. 353.

There is no case or doctrine in the books that will sustain the proposition of the note to 98 Am. Dec. 130, that because the statute has abolished the distinction between the case where the servant receives the property from his master and the case where he receives it from a third person, that therefore the bare custody of the property by the servant is a sufficient basis for a charge of embezzlement where the servant appropriates the property. If that were true, some writer of acknowledged authority on the criminal law, or some

court would have declared it to be the law long before this. The fact that no case can be found and that no writer on the criminal law can be cited to sustain the proposition, as well as the inherent unreasonable and illogical nature of it, are conclusive against the *ipse dixit* of the note in 98 Am. Dec. at page 130. There is no authority anywhere that gives the least support to the proposition that the words "under his care" in the statute, cover a case where there is a bare custody as contra-distinguished from possession.

It will be found in many states where the statute defining embezzlements is the same as in California, that the common law distinction between the bare custody and possession is still observed and followed as being entirely in harmony with the statute. In support of this statement, in addition to what we have above cited, we refer the court to

18 Am. & Eng. Ency. Law (2d ed.), 473 *et seq.*

The entire matter is made quite clear by Wharton, where he shows among other things that none of the cases provided for by the statute defining embezzlement and abolishing the distinction between a receiving of the property by the servant or agent from the master and receipt of it by a third person, were larceny at the common law; thus showing that the statute does not affect the common law.

1 Wharton's Crim. Law (10th ed.), secs. 1009, 1027, 1028.

It is certainly the correct conclusion that the law of California recognizes and follows the common law distinction between the bare custody and the possession,

in respect to larceny, and in respect to embezzlement.

18 Am. & Eng. Ency. Law (2nd ed.), 473 *et seq*;
10 Am. & Eng. Ency. Law (2nd ed.), 988.

Of course it will be borne in mind that the complaint and the evidence both show that defendant received the property from his employer. Apilaro represented his employer.

It must also be borne in mind that the treaty takes the distinction between larceny and embezzlement (U. S. Stat. at Large, Vol. 28 pp. 1072, 1073). Therefore evidence of the one will not sustain extradition for the other.

2. In the next place the charge against the defendant, that he embezzled 25000 roubles, "in Russian money" is the language of the complaint; but the evidence as presented by the depositions is that instead of *money*, he took and absconded with *bank bills*. Therefore, we insist, the evidence does not sustain the charge; and in support of the point we cite:

Besek vs. State, 44 Tex. 620;
Bishop on Statutory Crimes (3d Ed.), sec. 346;
Hamilton vs. State, 28 Am. Rep. 653;
State vs. Jim, 3 Murph. 3;
Rex vs. Hill, Russ. & Ry., 190;
Com. vs. Sweeney, 1 Va. Cas. 151;
McAuly vs. State, 7 Yerg. 526;
Johnston vs. State, Mart. & Yerg. 129;
Johnson vs. State, 11 Ohio St. 324;
State vs. Carr, 16 So. Rep. 155;
State vs. Collins, 72 N. C. 144.

The purport of these authorities is, that a charge of embezzlement or larceny of ***money*** is not proved by evi-

dence that the property taken was bank bills. Therefore we insist, there is no evidence that defendant committed the offense charged.

3. If the evidence tends to show anything criminal, it is that the defendant at the time of receiving the check and also the bank bills, intended to steal and carry away the same; that circumstance makes the offense *larceny* and not embezzlement. See

10 Am. & Eng. Ency. Law, 987;
Moore vs. United States, 160 U. S. 269.

4. It clearly appears from the evidence that defendant did not receive the property "by virtue of his em- " ployment as clerk". According to the evidence the duty of defendant was to execute the orders of the "office". On the occasion involved in the charge, he was not executing an order of the "office", but on the contrary was executing an order of the book-keeper, who had been directed by Zeefo to transmit the money to Novoroseesk. Instead of attending to the entire matter, in person, the book-keeper called upon defendant to assist him. It was not at all within the scope of defendant's employment to receive or transmit the money. Therefore his case does not come within the provisions of section 508 of the Penal Code. The burden of proving that defendant did receive the property by virtue of his employment as clerk of Zeefo, is upon the prosecution; the evidence wholly fails to prove the fact. The omission is fatal.

10 Am. & Eng. Ency. Law (2nd ed.), 990.

5. The evidence is also wholly insufficient to show that defendant appropriated the money. The mere fact

that he received the money and had not accounted for it but had taken his departure from Russia, is no evidence of crime, according to the laws of California.

People vs. Page, 116 Cal. 396;
People vs. Royce, 106 Cal. 178;
People vs. Wyman, 102 Cal. 552;
People vs. Tomlinson, 66 Cal. 344;
People vs. Gale, 77 Cal. 121.

Such has always been the law governing the accusation of embezzlement.

Reg. vs. Wolstenholme, 11 Cox C. C. 314;
Reg. vs. Chapman, 1 C. and K. 119;
Rex vs. Smith, R. and R. 267;
Bork vs. People, 16 Hun. 480;
Robinson vs. State, 35 S. E. Rep. 57;
1 Whart. Crim. Law (10th ed.), note 1 p. 879.

According to these authorities there is no evidence in this record even tending to show that the crime of embezzlement has been committed. The flight of the accused is no evidence of the *corpus delicti*.

Wharton's Crim. Ev., sec. 750.

Nor would his confession be any evidence thereof.

People vs. Jones, 31 Cal. 565;
People vs. Thrall, 50 Cal. 415;
Ex Parte Becker, 86 Cal. 402;
People vs. Elliott, 90 Cal. 587;
People vs. Simonsen, 107 Cal. 346.

Upon the point that there is no competent evidence in the record to show *embezzlement*, we would be understood as not at all impugning the rule that the weight of the evidence is not to be considered on *habeas corpus;*

but surely the absence of competent evidence is a point always available upon the writ in extradition cases.

Orteiza vs. Jacobus, 136 U. S. 330;
Terlinden vs. Ames, 184 U. S. 278;
See Treaty, Art. 1, U. S. Stat. at Large, vol. 28, p. 1072.

We again point out that the Treaty (U. S. Stat. at Large, pp. 1072, 1073, vol. 28), takes the distinction between larceny and embezzlement, and that therefore evidence of one will not sustain extradition for the other.

XII.

There are certain material facts alleged in the petition for *habeas corpus* that are not traversed in the return; they are therefore to be taken as the facts of the case.

Whitten vs. Tomlinson, 160 U. S. 242;
Kohl vs. Lehlback, 160 U. S. 296.

XIII.

The mandate.

The executive mandate does not confer authority where no authority exists under section 5270 Rev. Stat. Besides, the mandate speaks from its date, and only those persons to whom it is addressed, who were such at the date of its issuance, can come within its operation. For instance, if when issued, we will say for the extradition of a person in Arizona, that territory afterwards became a State, no Judge of the State court could act under the mandate, because he was not such when the mandate issued.

In the next place the mandate is void because it does not refer on its face to an extraditable offense. Only a

specified class of embezzlements is extraditable; but the mandate refers to embezzlement generally; if embezzlement generally was extraditable the mandate would be proper in its statement of the offense. As the mandate does not in terms designate the kind of embezzlement so as to show it to be within the treaty, it is a nullity.

1 Moore on Extr., sec. 223.

We respectfully submit that the judgment appealed from should be *reversed*.

Geo. D. Collins

Counsel for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

In the Matter of the Extradition of
SIMEON IVANOW GRIN,
alias
VALENTINE SEMASHKA.

BRIEF ON BEHALF OF THE RUSSIAN GOVERNMENT, INTERVENOR.

This is an appeal from the decision of the United States Circuit Court, Northern District of California, Ninth Circuit, dismissing a writ of *habeas corpus* sued out by said Grin, and remanding said Grin to the authority of the United States Marshal under a warrant of Commissioner Heacock for his extradition to the Empire of Russia.

Statement of the Case.

In the opinion of Hon. W. W. Morrow, Circuit Judge, reported in 112 Federal Reporter, page 790, there is such a complete statement of this case that we beg

leave to incorporate the same herein as presenting fully the salient facts in this case.

Extradition proceedings for the surrender of the petitioner herein were instituted on behalf of the Empire of Russia, under the provisions of the treaty of 1893 between the United States and Russia, charging the petitioner with the crime of embezzlement, committed under the following circumstances: On the 6th day of March, 1901, Simeon Ivanow Grin, a Russian subject, was residing in the city of Rostov on the Don, in the Empire of Russia, and was in the employ of the representatives of the firm of E. L. Zeefo & Co., an export corn-trading concern doing business in that city. On that day Grin was intrusted with the sum of 25,000 roubles in Russian money, in his capacity as clerk, by one of said representatives of the firm of Zeefo & Co., and instructed to deliver the said money to the administration of the Vladikavkaz Railroad, in said city. Grin did not deliver the money as directed, but appropriated the whole amount to his own use, and immediately absconded from the Empire of Russia to the United States; locating in the City and County of San Francisco, State of California. On October 8, 1901, the mandate of the Secretary of State of the United States was issued to the officers given jurisdiction of extradition proceedings, under Section 5270 of the Revised Statutes, directing the arrest of Grin upon the charge of embezzlement, and that a warrant should issue for his surrender to the Empire of Russia, pursu-

ant to treaty stipulations between that country and the United States, if, upon the proper proceedings, sufficient evidence of his guilt was produced. This mandate was presented to the United States District Judge for the Northern District of California on October 16, 1901, together with the complaint of the Russian Imperial Consul stationed at San Francisco. The said Judge thereupon issued a warrant for the apprehension of said Grin, in accordance with the terms of said mandate; ordering Grin to be brought before the said Court. This warrant was directed to the United States Marshal for the Northern District of California. The prisoner was not found within that jurisdiction, and on October 17, 1901, a second warrant was issued by said district judge for the apprehension of the said Grin, directed to the United States Marshal of any district of California. This warrant provided for the bringing of the prisoner before Hon. E. H. Heacock, a commissioner of said Court. On the same day a special order was made by said Court authorizing the said commissioner to discharge all the duties and exercise all the powers which may be performed by a Justice of the Supreme Court, or a circuit or district judge, under Section 5270 of the Revised Statutes. The prisoner was arrested under this warrant in the Southern district of California, and brought before the said commissioner, when the usual proceedings were had. On November 23, 1901, the said commissioner certified to the Secretary of State the record of such proceedings; also that

he deemed the evidence produced sufficient to sustain the charge of the said complaint under the provisions of the extradition treaty and convention between the United States and Russia; and that he had therefore issued his warrant for the commitment of the said Grin to the custody of the United States Marshal until proper orders were received from the President of the United States for his surrender to the proper officers of the Russian government. The said Grin thereupon petitioned the Circuit Court for a writ of *habeas corpus*, and for a writ of *certiorari* to the said commissioner, requiring him to certify to said Court the record, proceedings, and evidence, and his authority by virtue of which he assumed to issue and did issue a warrant of commitment against the petitioner. The petition was granted, the writs issued and obeyed, the matter fully submitted to the Court, and the Court dismissed the writ.

I.

The first point relied upon by the petitioner for a reversal of the judgment of the Circuit Court is the want of jurisdiction in the commissioner to act in these extradition proceedings.

There does not seem to be any question from the evidence as to the guilt of the prisoner. The only defense attempted has been an extremely technical one, and it is just such defenses in extradition proceedings that the Federal Courts look upon with disfavor.

The latest expression on this subject is by the United States Circuit Court of the Southern District of New York, *in re Neely*, 103 Federal Reporter, 629, where Judge Lacombe uses the following language:

> "Various technical objections are urged to the sufficiency (in form) of the various documents presented; as, for instance, that a certain certificate is signed by the military governor, and not by the principal diplomatic or consular officer; and that there is no certification that certain depositions are so authenticated 'as to entitle them to be received for similar purposes by the tribunals of the foreign country'—probably not material when authenticated so as to be received upon the special independent investigation to be had here under the Act of 1900. Objections of this class are not given the weight once accorded to them when the granting of a request for extradition was more jealously regarded by the Courts than it is today. Originally it seemed to be the theory that the sole foundation of the practice rested in reciprocity; and that, if some particular foreign country were backward about returning our criminals, we would be keen to keep theirs. During this period Courts were astute to find flaws in certificates, jurats, seals, and signatures as an excuse for refusing the request of some demanding government. At last, however, it seems to have been discovered that the thief, the ruffian, or the forger was not a particularly valuable acquisition; and that, although it might be highly desirable that offenders against our laws should be brought back here and tried, as a deterrent example, it was possibly more important that this country should not be made a city of refuge for foreign criminals, and that an enlightened public policy would be astute to return them, once we were satisfied that they were criminals. The expression of this public policy is found in the

provisions of the Act of Congress which excludes convicted criminals whose offenses are not political, with those afflicted with contagious diseases and such as are liable to become a public charge. Since then there has not been so much hypercriticism in dealing with objections as to form, and if the certificates, signatures, etc., are in substantial conformity to the requirements of the statute, and give reasonable assurance of authenticity, it is sufficient. Such seems to be the case here, and the documents are admitted for what they may be worth. Some of them are mere declarations of opinion, containing no relevant facts. Their effect, however, will not now be discussed."

In the case of *ex parte Sternaman*, 77 Federal 595, and *in re Herres*, 33 Federal 167, the same doctrine is laid down, that is, that the Courts of this country are anxious to get rid of these criminals if there is reasonable authenticity to the papers and documents and they are reasonably assured of his or her criminality.

In *ex parte Sternaman*, where objections were made to the complaint, as counsel has made to the complaint in this case, the Court says, at page 596:

> "The complaint should set forth clearly and briefly the offense charged. It need not be drawn with the formal precision of an indictment. If it be sufficiently explicit to inform the accused person of the precise nature of the charge against him it is sufficient. The extreme technicality with which these proceedings were formerly conducted has given place to a more liberal practice, the object being to reach a correct decision upon the main question—is there reasonable cause to believe that a crime has been committed? The complaint may, in some instances, be upon information and

belief. The exigencies may be such that the criminal may escape punishment unless he is properly apprehended by the representatives of the country whose law he has violated. From the very nature of the case it may often happen that such representative can have no personal knowledge of the crime. If the offense be one of the treaty crimes and if it be stated clearly and explicitly so that the accused knows exactly what the charge is, the complaint is sufficient to authorize the commissioner to act."

In re Herres, 33 Federal 167, which is an earlier case, Justice Brewer, of the Circuit Court, District of Minnesota, said:

> "Finally, I might observe, with reference to these extradition proceedings, that the substance, and not the form, should be the main object of inquiry, and that they should not be conducted in any technical spirit with a view to prevent extradition. While the Courts should review the proceedings to see that no extradition is consummated upon a mere pretext, or to subserve private malice, yet, if it appears that a crime has been committed, and probable that the accused has fled to this country for refuge, then a spirit of fairness, expecting that the foreign country will treat extradition proceedings from this country in the same spirit, requires that we act reasonable and justly, having reference more to the substance than to the form of the proceedings. Between governments, as between individuals, the golden rule is both wise and sound."

Appellant first claims that Commissioner Heacock did not have authority to act herein because the mandate issued by the Secretary of State was addressed in the language of the statute to "every Justice of the

" Supreme Court, district judge or circuit judge or " commissioner especially authorized". Appellant maintains that under this language Commissioner Heacock could not act, because he was not especially authorized to act at the time when the mandate was issued. The answer to this argument is that the mandate and the statute mean that the official who acts thereunder must be authorized to act at the time when he acts; for instance, if at the time when the mandate was issued there should be a vacancy in any one of these offices, or if subsequently to the issuance of the mandate the incumbent of any one of these offices should die, and the successor be appointed, there can be no question that the appointee to such vacancy prior to any *action* by him under the mandate would be competent to act thereunder and would be the person referred to in the mandate. It is only necessary that, when an official acts under such a mandate, he should at that time have the authority so to act.

II.

Appellant next maintains that the commissioner did not have jurisdiction to act, because the warrant was issued by the district judge and should have been made returnable before the district judge; that the commissioner could only act under a warrant that was issued by him, and he urges that the district judge in issuing the warrant of arrest and making it returnable before the commissioner, and not before himself, ex-

ceeded his power. The best answer to this point is found in the opinion of Circuit Judge Morrow on page 793 down to the bottom of page 795, 112 Federal Reporter. This portion of Judge Morrow's opinion is so clearly a complete answer to appellant that we ask the Court to read it as a part of this brief.

The record shows that the commissioner was especially authorized by an order of the United States District Court to act in such matters before the prisoner was arrested and before the commissioner took any steps in said proceedings. The practice followed in this case is of long standing in the same circuit. In the *Arnold case* the warrant was made returnable before the United States District Judge of that circuit, Judge De Haven, and the matter was referred by him to Commissioner Heacock for hearing. On the first hearing the prisoner waived all testimony and wanted to be sent back to England. He afterwards changed his mind, and a writ of *habeas corpus* was taken out before Circuit Judge Morrow. The said writ was sustained and the said case was re-referred by Circuit Judge Morrom to Commissioner Heacock for hearing.

The only necessary requisite for a commissioner to act in extradition proceedings is that before acting he must have been authorized to act under Section 5270 of the Revised Statutes. The mere fact that the warrant of arrest made returnable before the commissioner was made after the complaint was filed in the District Court could have no effect upon the matter. It does not mat-

ter when that complaint was filed or when the mandate was issued, the only question is, Did the official who acted under said warrant have jurisdiction to act at the time when he acted?

III.

Appellant claims that the complaint is defective because it does not use the word "fraudulent" in one place, and in another place because it uses the word "indictment". This has been settled under the law of California. Of course the commissioner or the judge sits entirely as a committing magistrate; therefore, apart from the language of the Court in *ex parte Sternaman*, that the complaint need not have the accuracy of an indictment or information, but is sufficient if it informs the prisoner of the nature of the charge he is compelled to answer, that complaint would be good under the Code and under the decisions of the Supreme Court of this state.

In *City and County* vs. *Randall*, 54 Cal. 408, the Court said:

> "The complaints allege that Tyler was president and manager of a corporation; as such manager had under his control securities of the value of $60,000, which were held by the corporation as a pledgee, the names of the owners of the securities being unknown to the deponent; and that Tyler did willfully, unlawfully, and feloniously embezzle and convert the securities to his own use, contrary to the execution of his trust. We think here is a substantial compliance with Section 1426 of the Penal Code."

There the words "willfully, unlawfully, and feloniously" are used, leaving out the word "fraudulently", which is used in the statute. That is in compliance with Section 1426 of the Penal Code, which is as follows:

> "All proceedings and actions before a Justice's or Police Court"--and in this case the commissioner sat as a committing magistrate—"for a public offense of which such Courts have jurisdiction, must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint."

That is almost the language of the Federal Court in *ex parte Sternaman*. In the *Randall case* one of the points was "that the complaint as to embezzlement did " not state facts sufficient to sustain a crime, in that " the property charged to have been embezzled is not " sufficiently described, and that it does not appear " whether it is felony or misdemeanor attempted to be " charged; that Tyler might have done all of the acts " alleged, and not been guilty of embezzlement". The Court held it was within the requirements of a complaint in a Justice's or Police Court. That same criticism is made against this complaint, and this complaint is on all fours with that. So much, therefore, as to the complaint.

IV.

Appellant next makes the point that these proceedings are defective because it does not appear that the

requisition was made by a diplomatic agent, or, in case of his absence, by his superior consular officer. The complaint is not the requisition referred to in Article VI of the treaty. Article VII of the treaty states:

> "It shall be lawful for any competent judicial authority of the United States, upon production of a certificate issued by the Secretary of State, stating that request has been made by the Imperial Government of Russia for the provisional arrest of a person convicted or accused of the commission therein of a crime or offense extraditable under this convention, and upon complaint, duly made."

SECTION 5270 says: "It shall be lawful for certain " officials, upon a complaint, under oath." The complaint is not the requisition referred to in Article VI of the treaty. The requisition referred to in Article VI of the treaty is the requisition referred to in this mandate, wherein the Secretary of State says, "upon the request " of M. de Wollant, Charge d' Affaires of Russian Em- " bassy", etc. If the requisition in Article VI is the requisition required before the complaint, then this mandate of the Secretary of State is conclusive proof that M. de Wollant was charged with the affairs of the Russian Embassy, and therefore the diplomatic agent. That document cannot be contravened. If, however, the requisition referred to in Article VI is subsequent to these proceedings, then it has not been yet made, and the time has not come, and there seems to be ground for that in Article VII. This Article in the middle of the first paragraph, reads:

"But if the formal requisition for surrender,

> with the formal proofs hereinbefore mentioned, be not made as aforesaid by the diplomatic agent of the demanding government, or, in his absence, by the competent consular officer within forty days from the date of the commitment of the fugitive, the prisoner shall be discharged from custody."

From the treaty it would seem that the requisition for the surrender referred to in Article VI is the requisition for the surrender made after these papers have gone to Washington, after the commitment.

Therefore, the requisition referred to in the treaty has been made, if it is required to be made, before the proceedings are begun, by the diplomatic officer, according to the mandate of the Secretary of State. If, however, as would seem to appear from Article VII, the requisition is the one for the formal surrender, made after the commitment, then, of course, it has not yet been made. But, in either case, the complaint is not the requisition. The complaint may be made by anyone.

In re Herres, 33 Federal 166, it was held that anybody can make the complaint, only it must appear in the proceedings somewhere that the proceedings are carried on at the instigation of the foreign government. That is the latest decision upon that point, that it must appear in the proceedings somewhere that the foreign government is behind the proceedings, and that they have been instigated and carried on by it. Section 5270 does not say who shall make it. Counsel says these proceedings have been begun without the necessary

preliminary requisition. Section 5270 simply says, "on a complaint under oath". Any one, apparently, can make it. Article VII of the treaty says, "and upon complaint duly made". But the complaint was under oath. It was made by the consul, and his consular rank presumes authority from his government, and there is no evidence that it was not done by its authority. In fact, he testifies that he did it, as consul. The complaint on its face is signed by him as consul, and his consular rank presumes he is acting on behalf of his government. It does not matter whether he testified that he was so instructed or not, so far as jurisdiction is concerned.

It was held by the Federal Court in the case of *Castro* vs. *De Uriarte*, 16 Federal 97, that a party can proceed either under the treaty, or under the revised statutes. He has two ways of proceeding. Under the revised statutes, there need be no previous mandate. There is no provision as to who shall make the complaint, only it must be under oath. There is no necessity for a warrant. The Court held in that case that, under the law, there is no necessity for a previous warrant; no necessity for a previous mandate, or a previous application; no requisite as to who shall make the complaint, and the party can proceed either under the law, Section 5270, or under the treaty. In 12 Blatchford 380, it was held that there was no necessity for a warrant.

When the question of jurisdiction is concerned, if the tribunal attempting to exercise jurisdiction has jur-

isdiction either under the law or under the treaty, if it has jurisdiction under any source, that is sufficient on a *habeas corpus* proceeding. If a magistrate has jurisdiction, and in *habeas corpus* the sole question is, Did he have jurisdiction, it is sufficient, from whatever source he gets it, and therefore, in an extradition proceeding, if the commissioner can trace his jurisdiction to the law, though it may not be in the treaty, or to the treaty, though it may not be in the law, both being the law of the land, that jurisdiction is sufficient to sustain his right to act in extradition proceedings. I do not believe there can be any dispute as to that proposition on that point.

In *Castro* vs. *De Uriarte*, which we have already referred to, the Court says:

> "Treaties duly ratified under the constitution (article 6) are doubtless a part of the supreme law of the land, and their stipulations and obligations will not be deemed annulled by acts of mere general legislation which can be reasonably construed otherwise. *The Cherokee Tobacco*, 11 Wall. 616, 623; *Taylor* vs. *Morton*, 2 Curt. 454; *Ropes* v. *Clinch*, 6 Blatchf. 304, 309. But the mere fact that a treaty provides a mode of carrying out its provisions, in the absence of legislation, cannot make it incompetent for Congress to pass laws in aid of the treaty, and, in order to facilitate the extradition of criminals, *to dispense with a part of those preliminaries which otherwise it might be necessary for the foreign government to resort to.* The procedure indicated by Section 5270, above quoted, is in substance identical with that contemplated by the treaty with Spain, except that it dispenses with any preliminary executive warrant. Had

there been no law of Congress on the subject, such an executive warrant would have been necessary in order to authorize the magistrates to proceed; but, inasmuch as the law of this country expressly authorizes the magistrates to proceed, 'whenever there is a treaty or convention for extradition', without reference to any preliminary executive warrant, such a warrant seems to me clearly unnecessary, if the demanding government chooses to avail itself of the law existing outside of the treaty, and proceed without the preliminary mandate."

Therefore, we say that if the commissioner finds jurisdiction in the Revised Statutes, it is sufficient, though all the requisites of the treaty may not have been carried out. But in this case there was the preliminary mandate, the complaint is duly made under oath, and it appears from the proceedings that the complaint was made by the consul, and that carries with it the presumption of his official authority.

V.

We next come to the warrant of arrest. Appellant claims that there is no warrant of arrest, or other judicial document issued by a judge or magistrate duly authorized to do so.

If the Court please, there is both the warrant of arrest and a judicial document. In one of the orders, dated the 23rd day of July, you will find it is ordered that the Cossack Grin is arraigned according to the section of the Code in the capacity of accused. It next

sets forth the penalty. It is then ordered that, having committed the crime of which he is thus accused, he be brought up for examination; and fourthly it says, it is ordered that he "is to be brought up for examination " pursuant to Paragraphs 2 and 3, Article 389, of the " *Code of Criminal Procedure*, as he is in hiding under " a false name, and, as is seen from his letters, is look- " ing out for means to prevent his arrest, and the find- " ing out of his address by the authorities, his place of " residence being known at present; that in view of the " proved fact of embezzlement", etc., "there can be and " must be undertaken his detention in custody upon his " examination as the accused, ORDERED: pursuant to " Paragraphs 1, 2, 3 of Article 389, of the *Code of* " *Criminal Procedure*, the Cossack Simeon Ivanow " Grin, alias Valentine Semashka, is to be brought to " the City of Rostov on the Don, in the Province of the " Don Army, in order to be placed at the disposition of " the Examining Magistrate". That is both a warrant of arrest and is a judicial document. It is ordered that the prisoner be brought there, to be placed at the disposition of the Examining Magistrate.

Then comes the next order: It is ordered, "That for " said crime, being embezzlement of a sum larger than " 300 roubles, said Simeon Grin, alias Valentine " Semashko, according to the orders of this date, is ar- " raigned in capacity of accused, pursuant to Part 1, " Article 1681 of the *Penal Code*, and is to be brought " for examination, and subsequently is to be prelimin-

" arily kept under arrest, upon his being examined as " the accused". Then, by virtue of the treaty, it is ordered "to make the proper representation in regard to " the extradition in proper form of the accused", etc.

There is a warrant of arrest. There is a judicial document ordering his arrest, ordering him to be brought to Rostov on the Don, to be kept under arrest, and to be placed at the disposition of the Examining Magistrate.

Appellant says that that warrant of arrest is not duly authenticated, there is no signature of any executive officer. *We claim, in the first place, that the warrant of arrest is not necessary to give jurisdiction under Section 5270 of the Revised Statutes.* We say, in the second place, that this paper, which is either a warrant of arrest or a judicial document equivalent thereto, does not have to be authenticated by the signature of any judge or any executive officer.

In Article VI of the treaty there is a distinction drawn between the authentication of a judgment of the Court and the authentication when the prisoner is simply charged. In Article VI, paragraph 2, it provides, if the prisoner whose surrender is requested has already been convicted of the crime or offense for which his extradition is demanded,

> "The demand therefor shall be accompanied by a copy of the judgment of the Court that pronounced the sentence, bearing the seal of said Court. The signature of the Judge thereof shall be authenticated by the proper executive officer of

the demanding government, whose official character shall, in turn, be attested by the diplomatic agent or superior consular officer of the government on which the demand is made."

As to when a person is simply charged, the only language is:

"Shall be accompanied by an authenticated copy of the warrant of arrest, or of some other equivalent judicial document issued by a judge or a magistrate duly authorized to do so, and likewise by authenticated copies of the depositions or declarations."

In the third paragraph of Section VI, even if the warrant of arrest were necessary, which we claim is not, the same language is used as to the authentication of the depositions. The language in the third paragraph of Article VI is the same for the authentication of the warrant as it is for the authentication of the depositions, and the authentication of the depositions in this case is correct.

The authentication of this document is in the language of the Statute of the Act of 1882. The authentication is:

"I, Charlemagne Tower, Ambassador Extraordinary " Plenipotentiary of the United States of America to " Russia, hereby certify that the annexed papers"— the annexed papers include, not only the protocols, the depositions, but include also this warrant of arrest and this judicial order, therefore the authentication is "that " the annexed papers, intended to be used in an appli-

" cation about to be made by the Government of Rus-
" sia for the extradition from the United States of
" America of Simeon Ivanow Grin, charged with the
" crime of embezzlement, alleged to have been commit-
" ted within the Empire of Russia, as set forth in the
" annexed papers, are properly and legally authenti-
" cated so as to entitle them to be received and
" admitted as evidence for similar purposes by the
" tribunals of Russia, as required by the Act of Con-
" gress of August 3rd, 1882."

That authentication is in the language of the statute of the Act of 1882, and is therefore good.

That was held *in re Herres*, 33 Federal 165.

In *1 Moore on Extradition*, pages 486, 490, 495, 496, 499, Sec. 321, 323, 326, 327, 329, there are a number of certificates of authentication almost identical with the certificate used in this case, all of which certificates were held good by the Courts in the cases that came before them. In fact, there is no difference between the language of this certificate and the statute, except that the statute uses the words "on the hearing", and the certificate uses the words "on the application about to be " made for the extradition"; otherwise the two certificates are exactly alike. That is the language of the statute and the language of this certificate. Therefore, the language of this certificate is good, because it is in the language of the statute. It is good because it is a substantial compliance with the statute. It is good from the precedents cited in half a dozen cases, all

cited in *Moore on Extradition*, and this authentication covers all the annexed papers, the warrant as well as the depositions. In fact it would be carrying it technically beyond everything, even the ingenuity of counsel, and he is learned in that regard, if a certificate drawn here, copied from the language of the Act of 1882, should be held insufficient. It would be impossible to make a certificate. This one is in line with the certificate sent over to England by this government and cited in Moore as a model to follow in such cases.

The last point before we come to the question of larceny is the point made by counsel that we used the word "indict" in our complaint. In reading the translation of some of these orders, we find that they use the word "indicted", and in drawing this complaint originally, having the original translation before us, we used that word. Under the ruling of our *Penal Code* as cited in the 54th California, and under the ruling in *ex parte Sternaman*, so long as this complaint informs the prisoner of the nature of the charge against him, the complaint is good on extradition matters. It would be good in the Police Court in San Francisco. Whether there is an indictment or not, as we use the word in our language, the mere fact that there is an allegation in the complaint that he has been indicted, may be treated as surplusage, so far as it is necessary in a proceeding of this kind.

VI.

Appellant's main point is that there is really charged here the crime of larceny, and not the crime of embezzlement, and as the prisoner cannot be sent over to be tried for larceny when he is charged with the crime of embezzlement, therefore he should be discharged.

Appellant bases his whole argument on the difference between "custody" and "possession".

There used to be a distinction between these words in this connection and some authorities so hold, but that distinction never has obtained in California, nor does it obtain to-day in many of the states. Appellant's point is that the money having been delivered to Grin, merely to take from the State Bank to the Railway Company, he merely had the *custody* and not the *possession* thereof, and, therefore, under the authorities by him cited, that was larceny, and not embezzlement.

The language of our Code, Section 503, is:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted."

All the Court has to find out in this case is, has property been entrusted to a person named in the Code, and has he converted it to his own use in violation of his trust?

Section 508, Penal Code, says:

> "Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to

his own use, any property of another *which has come into his control or care by virtue of his employment as such clerk, agent or servant is guilty of embezzlement.*"

In 98 American Decisions, page 130, there is a very long note on the subject of embezzlement.

> "It is undoubtedly", says the author, "in the power of the legislature to define the crime of embezzlement, and to make it include offenses which were at common law larceny; and in some states this has been done by statutes, which provide that a clerk, agent, servant, etc., may be guilty of embezzlement of property of another person which shall have come into his possession, '*or under his care*' by virtue of his employment. The phrase 'under his care' "—as in Section 508 of the Penal Code—"will cover property merely in his custody, and therefore, under such a statute, it is immaterial whether he receives possession of the property from a third person or from his master; for in either case the property is under his care, and if he converts it he is guilty of embezzlement. And if the statute makes the felonious conversion by a servant of the master's property in the master's constructive possession embezzlement, he must be indicted as such."

The old law, following appellant's authorities, made this absurd ruling,—a coal man, sent with some coal in a cart, sold the coal. The Court held that the cart was in the constructive possession of his master, and therefore the coal was, and he could not be guilty of embezzlement of the coal, because he had only the custody; but if he had stolen the coal when it was not in the cart, he would have been guilty of embezzlement. That was the ancient doctrine. Opposed to this is the

case of *State* vs. *Wingo*, 89 Indiana 204, where a farmer's servant was sent to market with some mules and some wheat in a wagon. He delivered the contents of the wagon, and then he sold the mules. The Court held he was guilty of embezzlement. He could not have been guilty of embezzlement under the doctrine of the coal case, because the mules were in possession of the master, and were simply in his custody.

This distinction between the old doctrine and the modern one is very well pointed out in the case of *New Mexico* vs. *Maxwell*, 2nd New Mexico 250, in which Chief Justice Prince of New Mexico commented on this distinction in the law as now and as it used to be. He said:

> "The first of these is that raised in the seventh point in the appellant's brief, which reads as follows: 'Proofs show that the money was received by defendant from his principal direct, and not from some one else for and on her account—which cannot be embezzlement.'"

That is the point appellant makes here: that this money was received from Zeefo, and therefore was larceny, and not embezzlement. Chief Justice Prince comments upon that, and says:

> "Many cases are cited (and they might have been multiplied indefinitely) in which it has been held, to use the language of Roscoe, that 'the chattel, money or valuable security embezzled by the prisoner must be such as has not come to the possession of his master—if it has come to his possession, the offense is larceny and not embezzlement'.

"The cases go so far even as to apply this principle to money received by one clerk from another in the same employ, because the latter was the agent of the owner."

So in this case, appellant claims this money was received by Grin from Apilora, who was the agent of the owner.

The Chief Justice continues:

"These authorities would be of much weight, and no doubt might control the determination of this Court, if the statutes under which they were promulgated were the same as ours. But in reality the statutes differ in exactly the essential particular required to make those decisions authorities with us.

"In both the English Statutes of 39 Geo. III., c. 85, and 7 and 8 Geo. IV., c. 20, the wording is as follows:

"'If any clerk or servant, etc., shall, by virtue of such employment receive or take into his possession'"—leaving out the words "*or care*"—"'any chattel, money or valuable security for, or in the name or on the account of his master', etc.

"The recent Act of 24 and 25 Victoria, c. 96, in the corresponding section (68), while differing in some other particulars from the older statutes, preserves this same language.

"In Massachusetts"—and he cites a case from Massachusetts—"and in many other states this language was followed, and all the decisions which make it essential that the property, money embezzled should have been received from some person other than the employer, will be found to have been pronounced under such statutes. And under these circumstances they are undoubtedly correct as this language, 'for or in the name or on the

account of', certainly implies that the articles are received for some third party.

"But in the law under which we are acting, these words are not employed. In many ways our statute is broader than those which we have quoted, and this is one of the most important of those respects. The wording here is (Sec. 22, p. 268, Gen. Laws), 'If any officer, etc., shall embezzle, or fraudulently convert to his own use any money or property of another which shall have *come to his possession*, or *shall be under his care* by virtue of his employment' "—

That is exactly the language of our Code (Section 508 Penal Code).

Then the Chief Justice says:

"There is no limitation as to the manner of the coming to his possession, or under his control, or the person from whom they may so come."—That is exactly our statute.—"This widens the scope of the law very much, and renders the decisions made under the more restrictive language of the older statutes entirely inapplicable. This we could hold from the very nature of the language employed, and the difference obviously made by the omission of the old restrictive clause without the need of any previous adjudication on the subject."

There is no distinction under our statute between "custody" and "possession", or "care" and "possession". If property is under an agent's care, like the mules in the Indiana case, if it is in his control or care, the appropriation thereof is embezzlement, because it has been entrusted to him. It does not matter in this case from whom it came, whether from Zeefo direct, or from Zeefo through Apilaro, or from a third

person. The money was entrusted to his care to take from the bank to the railway, and send it to Novorosseesk. Therefore, Grin is guilty of embezzlement, because he appropriated money that was in his care (*10 Am. & Eng. Ency. of Law*, 988, 118 *id.* 473). There has been nothing decided by our California Courts to the contrary.

In the case of the *People* vs. *Belden*, 37 Cal. 51, the Judge used the words "custody" and "possession" as meaning the same thing, and treated the two words as synonymous.

The law of embezzlement in this state is laid down in the case of *ex parte Hadley*, 31 Cal. 109. After going over the English authorities, etc., at page 112 the Court says:

> "It will be seen that there are four distinct propositions of fact to be made out in order to establish the guilt of the petitioner under this section. First, that he was the agent of Wells, Fargo & Co."—Hedley was accused of stealing from his employers. These are four things under the law of this state: "First, that he was the agent of Wells, Fargo & Co. Second, that he received money belonging to them. Third, that he received it in the course of his employment"—and the complaint charged that he was employed as clerk, and received it as clerk —"and fourth, that he converted the money to his own use."

Those are the four qualities of embezzlement in this state.

This prisoner was the clerk of Zeefo, he received money belonging to Zeefo, as the agent of Zeefo. When

the Zeefo check was cashed, as was said in the *Hadley case*—Hadley drew checks on Wells-Fargo, and they were cashed by his broker—the money became the property of Zeefo because it was drawn for Zeefo. Grin received it in the course of his employment, and he converted the money to his own use, with the intent to embezzle. These are the four requirements of embezzlement in this state, as laid down in the *Hadley case*.

But, suppose all of this argument were obliterated, still this case is not within the scope of appellant's authorities, because Grin did not receive the money directly from Zeefo, and the authorities hold—they are all collected in 98 American Decisions, 126—that if the property never got into the possession of the master, then it does not matter whether it was *custody* or *possession*, and the crime is embezzlement. In other words, the rule is, if a servant steals his master's goods before they come into his master's possession, he is guilty of embezzlement, and not larceny.

This rule is also laid down in *10 American & English Encyclopedia of Law*, page 988, which also gives the old rule cited by counsel,

> "Where property is delivered by a third person to a servant for his master, the servant has the possession, so as to be in the position of a mere bailee, until he has delivered the property to the master, or put it, for the master, in the place where it is his duty to put it."

In this case, Grin did not receive the money directly

from Zeefo, but he received it from the State Bank for Zeefo. When he had received it, it was Zeefo's money, as when Hadley cashed the checks, it was Wells, Fargo & Company's money. Then came the trust by Zeefo to deliver it to the railroad to be transported to Novorosseesk, and therefore, it was in Grin's possession until he had delivered it or put it for Zeefo in the place where it was his duty to put it.

> "And a conversion before this is embezzlement, and not larceny. When he has thus disposed of the property, thereafter the constructive possession of the property is in the master, and if the servant afterwards fraudulently converts the same to his own use, he commits larceny, and not embezzlement."

Suppose he had been ordered to bring the money back to Zeefo and had delivered it to him. If he had taken it thereafter he would have merely stolen it.

In 15 Wendell, N. Y. 581, there is a case under the New York statute, which is similar to ours. A guest at an inn gave a letter to the manager to mail, and in that letter was money. The manager handed it to the barkeeper to mail, to simply put it in the post office. The barkeeper opened it and stole the money. It was held it was embezzlement, because it was in his control and under his care.

People vs. *Gallagher*, 100 Cal. 466, is a case very much in point. A check was drawn by a corporation to the order of its secretary, he being authorized to fill in the amount, cash it, and pay certain debts. He filled

it in for a larger amount, cashed it, and appropriated the money. It was held to be embezzlement.

The last point made by counsel is that he did not embezzle the money; that he embezzled the check; that he stole the check. Those are not the facts of this case. The check was entrusted to him to deliver to the State Bank, and he never appropriated the check to his own use. He did with the check what he was told to do. He got the money from the State Bank as he was told to do. If, before he got to the State Bank, he had sold that check and taken the money, then that would have been an embezzlement of the check. But he cashed the check. The check was entrusted to him to get money on, and he obeyed his trust. Then, after he got the money, came the trust to deliver it to the railway, to be sent to Novorosseesk, and that money was then under his care, or in his possession, to carry out that trust, and he violated the trust by converting it to his own use.

Counsel next made the point that larceny is embezzlement when the party takes the property into his custody, with the initial intention of stealing it. The only way in which that fact can be used is when there has been some artifice, some trick, some conduct on the part of the accused to invite the trust, and the cases hold that therefore it is a taking from the possession of the owner, and obliterate the entrusting by the owner, because, they say, he would not have entrusted it if he had known of the fraud practiced on him.

The California Supreme Court has very clearly defined the difference between embezzlement and larceny.

In *People* v. *Tomlinson*, 102 Cal. 23, it said:

> "Where one honestly receives the possession of goods upon a trust, and after receiving them fraudulently converts them to his own use, it is a case of embezzlement. But when the possession has been obtained through a trick or devise, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts merely with the possession and not with the title, the offense is larceny."

Under this definition Grin's crime is embezzlement and not larceny. He received the property honestly. There was no trick or device on his part in obtaining possession of it. He receives it upon a trust, while acting in a fiduciary capacity, and he fraudulently appropriated it to his own use.

These are all the points made by counsel for appellant in the Circuit Court, and we have but one thing more to add. We have no doubt that the decision of the Circuit Court will be affirmed. But, in the event that this Court should be convinced to the contrary, we submit that under Section 761 of the Revised Statutes, this Court is not compelled to discharge the defendant, but can make whatever order it may desire in consonance with justice in the matter.

In re Gut Lun, 84th Federal Reporter, 323.

In this case a prisoner was brought from Arizona before the District Judge of this district, and a writ of *habeas corpus* was applied for. Apparently, he had to

be discharged from custody, because there had been no new warrant from the Arizona Court. Judge De Haven held the prisoner until a new warrant arrived, although he was compelled to sustain the writ.

There is a case in the 107th Federal Reporter, 440, where a Russian man-of-war was to be manned in Philadelphia. The commander of the ship came over with his crew, and one of them deserted. He was arrested at the instance of the Russian Consul, under the treaty in which each government agreed to in regard to deserters from the respective army or navy of either country. The claim was asserted that that applied to a crew after it was on the ship, and did not apply to men coming to become the crew. The case went to the Circuit Court of Appeals. The District Attorney admitted practically that the case was not within the treaty, and therefore, they had no right to arrest or hold the man under the treaty, but claimed that under Section 761, Revised Statutes, the Court would be justified in holding him, notwithstanding there was no right in the treaty, because he was a member of the Russian navy, and therefore comity between the nations would authorize such action. The Justices agreed that that would be their duty, and that they would do so, but for the fact that there was nothing before them to show he was a member of the Russian navy; that there had been no authorization by our government to allow any portion of the army or navy to touch on American soil. They held that if there had been any recognition by

our government of these men as part of the Russian naval department, it would be a fact before them that he was a deserter, and they would have held him.

So, we say, if the Court please, taking the utmost technical view of this case, this Court is not compelled to discharge this prisoner.

This is a case where the guilt of the prisoner is beyond doubt. There is the deposition of Apilaro that he handed Grin the check, and that he was Zeefo's clerk; that he told him what to do with this money. There is the deposition of the man that paid him the money and identified him by the photograph. There is the signature of Grin showing that he received 25,000 roubles. There is the deposition of the man who saw the money paid. There is the deposition of the agent of the railway that no money was ever transferred to them. There is the deposition of Zeefo that this man was his clerk at that time; and in addition to that, in the record, is the confession made by this man to the secretary of the Consulate, on the day he was arrested, admitting his guilt.

We submit that the judgment of the Circuit Court be affirmed, and respectfully request this Court to read the opinion of Circuit Court Judge, Morrow, reported in 112 Fed. Rep. 780.

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